Supreme Court, U.S.
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No. 04-

IN THE
Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P., *et al.*,
Petitioners,

v.

WAYNE SMITH, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit erred in holding – contrary to decisions of this Court and the Third and Tenth Circuits – that a settlement class cannot be certified as a matter of law when the class could not be certified for litigation.

2. Whether the Seventh Circuit erred in holding – contrary to decisions of the Third and Tenth Circuits – that a settlement class representative cannot satisfy the "adequacy" requirement of Rule 23(a) as a matter of law when the class includes members of already-certified litigation classes.

PARTIES TO THE PROCEEDING

Petitioners are Sprint Communications Company L.P., Qwest Communications Corporation, Level 3 Communications L.L.C., and WilTel Communications, L.L.C. Petitioners were defendants in the district court and appellees in the court of appeals.

Respondents are Chem-Tronics, Inc., Daniel R. Buhl, Joe C. Meighan, Charles W. Hord, and Joy Pratt Hord. Respondents were intervenors in the trial court and appellants in the court of appeals.

Respondents "by rule" under Rule 12.6 of the Rules of this Court are Wayne Smith and all others similarly situated, who were plaintiffs in the district court and appellees in the court of appeals. Numerous intervenors in the district court did not appeal.

RULE 29.6 DISCLOSURE

Sprint Communications Company L.P. is a Delaware limited partnership. Its partners are US Telecom, Inc., UCOM, Inc.; UTELCOM, Inc.; and Sprint International Communications Corporation. Sprint International Communications Corporation is wholly-owned by UTELCOM, Inc.; US Telecom, Inc., UCOM, Inc.; and UTELCOM, Inc. are wholly-owned by Sprint Corporation. No publicly held company owns ten percent or more of the stock of Sprint Corporation.

Qwest Communications Corporation is a wholly-owned subsidiary of Qwest Services Corporation, which is a wholly-owned subsidiary of Qwest Communications International Inc. No publicly held company owns ten percent or more of the stock of Qwest Communications International Inc.

Level 3 Communications, Inc. is the parent corporation of Level 3 Communications L.L.C. No publicly held company owns ten percent or more of the stock of Level 3 Communications, Inc.

WilTel Communications Group, Inc. is the sole member of WilTel Communications, LLC. Baldwin Enterprises, Inc. owns 100% of the stock of WilTel Communications Group, Inc. Leucadia National Corp., a publicly held company, owns 100% of the stock of Baldwin Enterprises, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Sprint Communications Company L.P., Qwest Communications Corporation, Level 3 Communications L.L.C., and WilTel Communications L.L.C. pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Seventh Circuit is reported at 387 F.3d 612 and is reprinted in the Appendix ("App.") at 1a. The order of the Seventh Circuit denying rehearing and rehearing en banc is reprinted at App. 32a. The opinion of the district court, unreported, is reprinted at App. 12a.

JURISDICTION

The court of appeals' opinion was issued on October 19, 2004. A timely petition for rehearing and rehearing en banc was denied on December 13, 2004. App. 33a. Justice Stevens granted an application to extend the time in which to file a petition for a writ of certiorari until April 13, 2005. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332, and 1367. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULE INVOLVED

The text of Federal Rule of Civil Procedure 23 is reprinted at App. 34a.

STATEMENT OF THE CASE

This case is about the authority of parties and courts to reach fair and practical resolutions of highly complex, multiparty, nationwide commercial litigation. The district court below certified a nationwide class action as a means of settling 42 cases pending in 32 state and federal courts involving 36,000 miles of railroad rights of way. The settlement agreement was reached after years of litigation and months

of negotiation, which involved all affected parties and included numerous modifications demanded by the district court, in the course of a months-long review and approval process, to ensure the settlement's fairness to all class members.

In a 2-1 opinion that misconstrues this Court's decisions and conflicts with the decisions of other federal circuits, a Seventh Circuit panel (Judge Cudahy dissenting) reversed the settlement class certification, effectively unwinding the successful resolution of this complex dispute. The Seventh Circuit's decision does not address the district court's specific findings on the requirements of Federal Rule of Civil Procedure 23, much less give those findings the deference they are owed under this Court's precedents. *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 703 (1979). Rather, the decision announces a blanket rule, which not only reverses the class certification order in this case, but will in practice effectively strip all federal district courts in the Seventh Circuit of the power to certify nationwide classes of plaintiffs for purposes of reaching a conclusive settlement of common-law property and contract claims. Though couched in the language of Rule 23, the decision below disregards the commands of the rule, supplanting it with a conclusive legal presumption that a nationwide *settlement* class cannot be certified – as a matter of law – where a nationwide *litigation* class cannot be certified. The decision also holds that the named plaintiffs of a nationwide settlement class cannot – as a matter of law – adequately represent the interests of the class if statewide litigation classes are already pending. Because such circumstances exist in nearly all multi-plaintiff commercial actions of any notable size and complexity, the decision below will likely have the practical effect of derailing any attempt within the Seventh Circuit to resolve complex nationwide disputes without competitive, conflicting and costly state-by-state litigation.

As noted in Judge Cudahy's dissent below and in the opinions of other circuits affirming settlement class certifications in materially identical circumstances, the answer to concerns of conflict and fairness in nationwide class settlements lies not in a categorical rule precluding such settlements, but in the plain language and policies of Rule 23, which authorizes district courts to certify classes that assert sufficiently homogenous claims, and to approve classwide settlements after careful inquiry into the structural and substantive fairness of the settlement to all class members. The district court in this case engaged in painstaking scrutiny of the proposed settlement, requiring repeated revisions of the agreement, designed to ensure that class members with comparatively stronger claims received proportionally higher shares of recovery. Under this Court's precedents, the court of appeals should have deferred to the district court's expertise and judgment in concluding that all class members were adequately represented and ultimately approving the settlement as fair. The court of appeals did not defer – because it incorrectly construed both Rule 23's requirements and the precedents of this Court. Certiorari should be granted.

A. General Background

Petitioners are four telecommunications companies and parties to the settlement agreement underlying this petition: Sprint Communications Company L.P.; Qwest Communications Corporation; Level 3 Communications L.L.C.; and WilTel Communications, L.L.C. Beginning in the 1980s, Sprint and the other petitioners purchased easements or licenses from over 50 railroads. Petitioners then constructed substantial portions of their fiber-optic networks in the railroads' rights of way. This was consistent with a century-old practice of installing first telegraph lines, then electrical cable, and now fiber-optic cable in railroad rights of way to provide telecommunications service. *See generally* Danaya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles:*

Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries, 27 Ecology L.Q. 351 (2000). The new cables were designed to provide long-distance telephone service following the breakup of the AT&T monopoly and to lay the groundwork for high-speed internet service. These cables have since become a vital part of the national telecommunication grid, the national economy, and the national security infrastructure. App. 5a (Cudahy, J., dissenting).

Over the last three decades, dozens of class actions have been filed in various state and federal courts against the petitioners by owners of land adjacent to the railroads' rights of way. The complaints allege that, in some portions of the rights of way, the railroads own easements rather than fee simple interests; that the easements do not authorize telecommunications use; and that the non-consenting landowners are entitled to compensation for the unauthorized use of the rights of way by telecommunications companies. Plaintiffs in these actions have alleged millions of dollars in damages and, in some instances, sought to have the fiber-optic cables – the very bloodlines of the national telecommunications grid – stripped out of their physical beds.

B. The Settlement Negotiations

One of these actions was filed in June 1999 against Sprint and Union Pacific Railroad Company in the Northern District of Illinois The parties entered into global settlement negotiations – implicating all the various actions – in the fall of 2000. At the time, the group of 26 law firms headed by Heins, Mills & Olson, P.L.C. ("Heins group"), represented plaintiffs in 15 fiber-optic right of way cases pending in nine different states, and had been jointly prosecuting those actions over a two-year period. By the time counsel for MCI (which was a settling defendant until its bankruptcy filing in July 2002) approached the Heins group about settlement, statewide class certification motions were pending in cases

the group had commenced in Wisconsin, Missouri, Illinois and Kansas, 22 depositions had been taken, and the Heins group had expended more than 20,000 hours of attorney and paralegal time to that effort. Heins Aff. ¶ 2 (Oct. 3, 2002); Heins Aff. ¶ 10-11, 13, 16, 21 (Sep. 3, 2002); Mills Aff. ¶ 1 (Oct. 10, 2003). In September 2002, the parties reached a comprehensive settlement agreement, and filed an initial Motion for Preliminary Approval and a Motion for Injunction of Competing Claims.

C. The Lengthy Judicial Approval Process

In response to the motion for approval of the agreement, the district court entered a scheduling order that provided for two months of discovery and permitted intervenors to file briefs in opposition to the settling parties' motions.

1. *Intervenors' Objections*

The principal respondents in this Court are five plaintiffs – appellants in the decision below – who intervened to object to the settlement and injunction. The "Tennessee Intervenors" are four landowners with two statewide litigation class actions certified and pending in Tennessee state court – one against Sprint (*Buhl/Meighan v. Sprint*) and the other against Qwest (*Hord v. Qwest*). *See Meighan v. U.S. Sprint Communs.*, 924 S.W.2d 632 (Tenn. 1996); *Buhl v. U.S. Sprint Communs. Co.*, 840 S.W.2d 904 (Tenn. 1992); *Hord v. Qwest Communs. Int'l, Inc.*, No. 40084 (Tenn. Cir. Ct. 2000) (Order Determining Action to be Maintained As a Class Action). The "Kansas Intervenor" is Chem-Tronics, which had a certified litigation class action pending in Kansas state court against Sprint. The class was a Kansas-only class and excluded persons whose property adjoins federal land grant rights of way.

The settling parties and intervenors engaged in extensive discovery. The settling parties produced thousands of documents to intervenors. They also conducted 18 depositions,

including seven of expert witnesses, all of which were attended by the court-appointed Special Master or one of his associates. *See* Third Report of the Special Master (Jun. 27, 2003).

The intervenors sought to establish that the settlement agreement was the product of an objectionable "reverse auction," prominently described by Judge Posner as the "practice whereby the defendant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement with in the hope that the district court will approve a weak settlement that will preclude other claims against the defendant." *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002). The magistrate judge reviewed the evidence and found it "clear that the situation here is not remotely like that of the *Reynolds* case," and that there was no evidence to "support an inference of collusion." Mem. Op. Regarding Intervenors' Mot. for Discovery of Settlement Negotiations at 5, 9 (Nov. 19, 2002) (App. 25a, 29a). Specifically, the magistrate noted the absence of any evidence that the defendants "solicited demands from different plaintiffs' groups in an effort to play them off against each other." App. 29a. "On the contrary, the Intervenors' counsel was the one who approached the Settling Defendants and made specific proposals that were rejected." *Id.* at 29a-30a. To ensure that there was no further basis for intervenors' reverse auction claim, the magistrate ordered the settling parties to provide the Special Master with documents exchanged between counsel for the settling parties between April 1, 2001 and September 4, 2001. The Special Master reviewed the documents and found that they "evidence significant disagreement, rewriting and compromise in the language of the Settlement Agreement," and "vigorous advocacy by both defendants' counsel and proposed plaintiffs' class counsel." Report of Special Master at 4 (Jan. 3, 2003) (App. 45a). "Nothing within the [negotiation] documents," the Special Master concluded, reflected "'evidence' of a reverse auction." *Id.*

The magistrate judge overruled intervenors' objections to the Special Master's report. The district court affirmed the findings of the Special Master and the magistrate.

2. *Judicial Modifications*

The initial September 2002 settlement agreement called for an average payment, before attorneys' fees, of $.75 per linear foot of right of way. The initial linear foot amount was subject to certain adjustments. These included an adjustment based upon assessments of the relative strength of class members' claims in each state. The assessment was to be made by independent real property law experts selected by the parties and approved by the district court. *Id.* The settlement was valued at more than $140 million, plus millions of dollars more in administrative costs born by the settling defendants. Dist. Ct. Order, Jan. 27, 2004, at 3. Class members were not required to submit proof of title to the right of way in order to make a qualified claim.

In March 2003, the district court informed the settling parties that it was not likely to approve the settlement agreement unless it were restructured to provide a two-tiered payment system, under which a class member who has a higher probability of demonstrating that the railroad does not own fee title to the adjacent right of way would be paid more than a class member who has a relatively low probability of making such a showing. The settling parties then commenced re-negotiation of the agreement. Three months later, the parties submitted a motion for preliminary approval of an amended settlement agreement that took into account the district court's suggestions.

At yet a third hearing on the settlement in July 2003, the district court again indicated that it was not inclined to approve the amended agreement unless several additional changes were made. The Second Amended Agreement – the final agreement between the parties – addressed the district court's concerns. The final settlement, proposed in July

2003, covers approximately 36,000 miles of right of way. The settling parties submitted evidence indicating that the railroads own approximately 75% of their rights of way in fee. Based upon that estimate, the total amount that settling defendants may be required to pay for qualified claims and attorneys' fees exceeds $142 million. In addition to paying for qualified claims and attorneys' fees, the agreement requires the settling defendants to identify and provide mailed notice to all persons who currently own property adjacent to the cable side of those rights of way. Defendants have now substantially completed the process of identifying landowners, at a cost of approximately $11.7 million.

On July 25, 2003 – ten months after the settling parties filed their initial motions for preliminary approval and injunctions against competing claims, and after extensive hearings to address the concerns of the intervenors – the district court entered orders granting conditional certification of a settlement class, granting preliminary approval of the Second Amended Settlement Agreement ("Settlement Agreement"), and granting an injunction against competing class action claims.

D. A Divided Seventh Circuit Panel Reverses

Dozens of individual plaintiffs originally intervened to object to the original settlement below, but following the modification proposed by the district court, only the four *Buhl/Meigan* intervenors from Tennessee and Chem-Tronics from Kansas appealed. A divided Seventh Circuit panel vacated the district court's certification of the settlement class and injunction against competing class actions. The panel majority held that the intervenors were inadequately represented by the settling plaintiffs.

1. The majority found that the settling plaintiffs were inadequate representatives because they were effectively "disarmed," as this Court had concluded with respect to the settling plaintiffs in *Amchem Prods., Inc. v. Windsor*, 521 U.S.

591, 621 (1997). App. 4a. Whereas intervenors had obtained statewide class certifications in the Tennessee and Kansas actions, the settling plaintiffs represented a nationwide class that had not been certified for trial. *Id.* Nor could such a class *ever* be certified, the majority ruled, citing *Isaacs v. Sprint Corp.*, 261 F.3d 679, 681-82 (7th Cir. 2001). App. 4a. The majority concluded that the "nationwide class plaintiffs thus entered negotiations in what the *Amchem* court describes as a 'disarmed' state, unable to 'use the threat of litigation to press for a better offer' – not a good position from which to represent the interests of parties that do wield such a threat." *Id.* (quoting *Amchem*, 521 U.S. at 621).

The majority was unmoved by the fact that the settlement expressly provided for a system of adjustments to class member recoveries to reflect the relative strength of claims under different states' laws. Such fairness adjustments in a settlement, the court held, cannot "substitute" for the "structural assurance of fair and adequate representation" that Rule 23 provides. *Id.*

2. Judge Cudahy dissented. In his view, the majority opinion "entirely lost sight of the benefits of the federal court settlement that has been successfully negotiated here." *Id.* at 5a.

> The development involved here is the laying of a 36,000-mile network of transcontinental fiber-optic cables crossing many states to provide a national telecommunications grid. This installation of fiber-optic cables becomes part of the national communications infrastructure, having an important value for the national economy as well as for national security. Obviously, to the extent uniformity in treatment of affected landowners can be achieved, legal costs and costs of administration (ultimately charged to telecommunications users) can be reduced.

Id. In contrast to these benefits of a comprehensive resolution of the disputed right-of-way issues, Judge Cudahy observed, "[t]he state-by-state treatment favored by the majority is likely to produce a nightmare of complexity, the inequitable treatment of landowners in different states and increased charges to telephone users everywhere." *Id.*

Judge Cudahy explained that the majority erred in finding the settling plaintiffs to be "disarmed" and thus inadequate representatives under *Amchem* because, unlike the settling plaintiffs in *Amchem*, the plaintiffs in this case actually wielded enormous settlement leverage over the defendants. In *Amchem*, the rejected settlement class encompassed *future* claims, which concededly posed no present litigation threat to the defendants, and were not likely to be pursued by the named plaintiffs in the absence of settlement. Because they wielded no live, material threat of litigation, plaintiffs seeking to settle future claims were effectively "disarmed" and thus inadequate representatives of the as-yet-nonexistent future claimants. *Amchem*, 521 U.S. at 600-01, 621; *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 638 (3d Cir. 1996) (Wellford, J., concurring). In Judge Cudahy's words, the *Amchem* plaintiffs wielded the threat of nothing more than "mere speculation about the possibility of filing future actions." App. 7a.

"In stark contrast," Judge Cudahy noted, counsel for the settling plaintiffs "could exert enormous [settlement] leverage over the defendants, since the alternative to settlement for the defendants is to spend years litigating the case in many different state court venues," which according to intervenors could result in even higher damage awards. *Id.* (stating that plaintiffs threatened petitioners with "expensive and lengthy chaos in the various states that the fiber-optic cable has traversed"). Thus, "[f]ar from being the classic disarmed counsel, these counsel have the fabled weapons of mass destruction." *Id.*; *see also id.* at 10a (observing that "class

counsel were anything but disarmed but could constantly wield the threat of a disorderly recourse to state litigation").

Judge Cudahy also rejected the majority's conclusion that Rule 23 had not been and could not be satisfied in this case. The district court specifically found that all the requirements of Rule 23 were satisfied, Judge Cudahy noted, and the majority opinion made no effort – beyond its categorical rejection of settlement class certification in this context – to explain why the district court abused its discretion in making those findings. *Id.* at 8a-9a. Because the class was properly certified under Rule 23(a) and (b), and the settlement was properly approved under Rule 23(e) as fair to all class members, Judge Cudahy concluded that the district court's judgment should have been affirmed.

3. A timely petition for rehearing and rehearing en banc was denied. This petition followed.

REASONS FOR GRANTING THE WRIT

The comprehensive settlement agreement in this case, resolving dozens of fiber-optic right of way cases, was reached after years of litigation, months of negotiation, substantial input from objecting intervenors, over 1,000 hours of work by a Special Master appointed to assist the district court in managing settlement-related discovery and assessing the fairness of the agreement, and active participation and revision by magistrate and district judges in reaching the final terms of the settlement. The agreement seeks to end the decades-long dispute over the laying of fiber-optic cables in 48 states, and to do so by providing fair compensation to property owners without embroiling the affected parties in interminable litigation and possibly even disrupting the physical structure of the national telecommunications grid.

The Seventh Circuit reversed the class certification that facilitated the settlement on grounds applicable in virtually any case of similar nationwide scope and complexity: 1)

because a nationwide *litigation* class could not be certified, a nationwide *settlement* class is categorically impermissible, and 2) because individual state litigation classes had already been certified, the settling plaintiffs were necessarily "inadequate," again categorically precluding certification of the settlement class. Each aspect of the majority's holding conflicts with the key precedents of this Court, the decisions of other circuits, and is wrong as matter of law, logic and policy. Certiorari should be granted and the judgment should be reversed.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

The decision below conflicts with the decisions of this Court and of the Third and Tenth Circuit, in two distinct but related respects. *First*, the decision erroneously holds that certification of a settlement class is categorically impermissible where the same class could not be certified for litigation. That holding squarely conflicts with *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *In re Warfarin Sodium Antitrust Litigation*, 391 F.3d 516 (3d Cir. 2004); and *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180 (10th Cir. 2002). *Second*, the decision below erroneously holds that a settling plaintiff is *necessarily* "inadequate" under Rule 23(a) when the proposed settlement class includes representatives of already certified statewide litigation classes. That holding also conflicts with *Amchem*, *Warfarin*, and *Rutter & Wilbanks*, as well as *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and the decisions of other circuits establishing the standards for evaluating a plaintiff's "adequacy" for purposes of Rule 23(a).

A. The Majority's Holding That A Settlement Class May Be Certified Only Where A Litigation Class Could Be Certified Conflicts With Decisions Of This Court And Other Circuits

This Court held in *Amchem* that a court may not ignore the requirements of Rule 23 and certify a class solely because certification is limited to settlement purposes. The Court disagreed, however, with the Third Circuit's conclusion that those requirements "must be satisfied without taking into account the settlement." *Id.* at 619 (internal citations omitted). Instead, the Court held that "settlement is relevant to class certification," *id.*, that "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems," *id.* at 620, and that the Third Circuit "should have acknowledged that settlement is a factor in the calculus" by which it determined the propriety of class certification, *id.* at 622.

The Seventh Circuit majority acknowledged these principles, App. 3a-4a, but its decision leaves no room for treating a settlement class differently from a litigation class in any respect. Instead, the majority concluded that class representatives are *necessarily* disarmed in negotiating a settlement on behalf of a class that cannot be certified for litigation purposes. *Id.* at 4a. Because under the majority's reasoning a disarmed representative is a conclusively inadequate representative, the majority's conclusion flatly precludes certification of a class for settlement purposes unless it can also be certified for litigation purposes. That result contradicts *Amchem* and decisions from other circuits.

Amchem's ruling that settlement must be taken into account in deciding whether to certify a class means that, contrary to the decision below, there *are* classes that can be certified for settlement but not for litigation purposes. The Seventh Circuit therefore should have considered, as the district

court did,[1] whether the concerns that led the court of appeals previously to decide that "[t]his is a nightmare of a class action," *Isaacs*, 261 F.3d at 682, were related to manageability or otherwise obviated by the settlement. Other courts of appeal have undertaken that precise analysis when presented with similar questions, and have concluded that certification of the settlement class is entirely appropriate.

In re Warfarin Sodium Antitrust Litig., 391 F.3d 516 (3d Cir. 2004), involved a nationwide settlement class that included consumers and third-party payors who asserted claims under the consumer fraud and deceptive practices statutes of all fifty states and the District of Columbia. Under Third Circuit precedent, certification of such a class for litigation purposes was, at best, highly unlikely. *See In re LifeUSA Holding*, 242 F.3d 136, 147 (3d Cir. 2001); *Georgine*, 83 F.3d at 630, *aff'd*, *Amchem*, 521 U.S. 591. The court recognized that "there is a significant risk that such a class would create intractable management problems if it were to become a litigation class, and therefore be decertified." *Warfarin*, 391 F.3d at 537. The court, however, resisted objectors' urging to conclude that, because the class could not be certified for litigation purposes, it also could not be certified for settlement. *Id.* at 529. Instead, the court undertook a careful analysis of the district court's conclusion that the concerns objectors raised went to manageability or were otherwise insufficient to defeat certification in the settlement context. Based on that analysis, the court of appeals ruled that "the District Court was well within its discretion" to certify the settlement class. *Id.* at 530.

The Tenth Circuit has likewise concluded that the inability to obtain certification as a litigation class does not pre-

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[1] The district court concluded: "In light of the agreement to settle the Action and the resulting elimination of individual issues that may otherwise have precluded certification of a class, the prerequisites [of Rule 23] are satisfied." Preliminary Approval Order, ¶ 3 (App. 13a).

clude certification as a settlement class. In *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180 (10th Cir. 2002), the district court had twice denied class certification for litigation purposes "because the court determined that the alleged class members' interests were too divergent." *Id.* at 1183. The claims later certified for class settlement "were largely identical to those claims" for which class treatment had previously been denied. The Tenth Circuit rejected objectors' argument that the prior denials of class certification supported "an inference of collusion." *Id.* at 1189 n.5. Instead of concluding that the class representatives were necessarily disarmed by the district court's previous orders, the Tenth Circuit considered whether the division of the class into subgroups resolved any representational deficiencies. *Id.* Concluding that it did, the Tenth Circuit affirmed.

The Seventh Circuit's decision that a settlement class may not be certified in a case where a litigation class would be inappropriate directly conflicts with this Court's decision in *Amchem*, and the decisions of the Third Circuit in *Warfarin* and the Tenth Circuit in *Rutter & Willbanks*. *See also* Alba Conte & Herbert Newberg, 4 *Newberg on Class Actions* § 11:27, at 56-57 & n.40 (collecting district court decisions "that have denied a class for litigation purposes [and] subsequently approved [the same] classes for settlement purposes"). This Court should grant certiorari to resolve this conflict.

B. The Majority's Holding That A Settling Plaintiff Is Necessarily An Inadequate Representative Of Class Members With Pending Statewide Litigation Classes Conflicts With Decisions Of This Court And Other Circuits

The Seventh Circuit's rejection of the class certification and nationwide settlement in this case rests on this Court's reference in *Amchem* to "disarmed" class representatives. App. 4a. According to the panel majority, a settling plaintiff is necessarily "disarmed" compared to class members with

pending statewide litigation classes, and is thus a conclusively "inadequate" class representative under Rule 23(a).

The Seventh Circuit not only misconstrues the reference to "disarmed" plaintiffs in *Amchem*, but applies the reference to reach a result quite *opposite* the core holding of *Amchem* itself, and quite contrary to the decisions of other circuits addressing the adequacy of settlement class representatives.

1. As Judge Cudahy's dissent explains, this Court's reference in *Amchem* to "disarmed" (and thus presumptively inadequate) plaintiffs described a type of plaintiff that is almost the polar opposite of the settling plaintiffs in this case. The "exposure-only" settlement class in *Amchem* did not wield any viable litigation threat whatsoever: none of the named plaintiffs or class members had pending claims against the defendants; many of the class members did not have any symptoms of illness that would alert them to potential claims; and the record showed that the representatives "clearly conceded" that, "absent the settlement, they did not intend to pursue the claims in the class complaint." *Georgine*, 83 F.3d at 638 (Wellford, J., concurring). *Amchem* thus presented the rare case where attorneys attempted to settle prospective claims that were unlikely to be litigated in nationwide class actions, in statewide class actions, or individually. *See Amchem*, 521 U.S. at 600-01.

"In stark contrast," as Judge Cudahy explained, counsel for the settling plaintiffs in this case "could exert enormous settlement leverage over defendants," because they could threaten them with "expensive and lengthy chaos in the various states that the fiber-optic litigation has traversed." App. 7. Thus, "[f]ar from being the classic disarmed counsel, these counsel have the fabled weapons of mass destruction." *Id.*; *cf. In re Diet Drugs Prods. Liab. Litig.*, 2000 WL 1222042, at *45 (E.D. Pa. Aug. 28, 2000) (concluding that class counsel was not disarmed in nationwide settlement negotiations due to "threat of imminent and ongoing litigation," where certified state and MDL litigation classes were pend-

ing and thousands of individual actions were proceeding through discovery); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 Sup. Ct. Rev. 337, 349 (1999) (class counsel not "disarmed" under *Amchem* "*if* they retained a credible trial threat in that or another jurisdiction, either in some aggregative capacity or through repeated individual trials"). The decision below thus errs fundamentally in treating the settling plaintiffs in this case as equivalent to the settling plaintiffs in *Amchem*.

2. Still more important, however, the Seventh Circuit's reliance on *Amchem*'s reference to "disarmed" class representatives ignores the context of the reference, and thus misapprehends its true legal significance. As the full context of the Court's reference reveals, its purpose is merely to illuminate the issue that actually matters in the adequacy of representation inquiry, *viz.*, whether there is an arm's length bargaining relationship between the class representative and the defendants that is free of any conflicts of interest. If the class representative has no real case against the defendant absent the settlement, *collusion* – the real problem – is all the more likely:

> [I]f a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, *see* Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1379-1380 (1995), and the court would face a bargain proffered for its approval without benefit of adversarial investigation, *see, e.g.*, *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1352 (CA7 1996) (Easterbrook, J., dissenting from denial of rehearing en banc) (parties "may even put one over on the court, in a staged performance").

Id. at 621. Thus, the *Amchem* Court recognized that without an adversarial, arms-length bargaining process between the parties, courts could not ensure that absent parties were adequately protected by the class representatives. *Id.*; *cf.* Issacharoff, *supra*, at 388 ("class counsel are necessarily 'disarmed,' as defined by *Amchem*, where the sine qua non of their representation of the class is their selection by the opposing party or the acquiescence of that party").

The Court reaffirmed this understanding of "disarmed" plaintiffs – and their relevance to adequate representation in the settlement class context – in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). As in *Amchem*, defense counsel initiated negotiations with plaintiffs' lawyers that they selected to discuss a settlement that would resolve all future (but not pending) asbestos claims. *See id.* at 823-24. In the course of holding that settlement value was a poor indicator of whether the mandatory class at issue warranted limited-fund treatment under Rule 23(b)(1), the Court elaborated upon *Amchem*'s discussion of the conflicts that may arise and disarm a class for purposes of Rule 23(a)(4). The settlement negotiations, the Court noted, did not involve "arms-length bargaining, unhindered by any considerations tugging against the interests of the parties ostensibly represented in the negotiation." *Id.* at 852. Rather, "the same lawyers representing plaintiffs and the class had also negotiated the separate settlement of 45,000 pending claims, the full payment of which was contingent on a successful global settlement agreement or the successful resolution of the insurance coverage dispute." *Id.* (internal citation omitted). The formation and structure of this contingent agreement, the Court noted, almost necessarily ensures an impermissible conflict that renders the class representatives disarmed and thus inadequate: "The resulting incentive to favor the known plaintiffs in the earlier settlement was, indeed, an egregious example of the conflict noted in *Amchem* resulting from divergent interests of the presently injured and future claimants." *Id.* at 852; *see*

also id. ("Side settlements suggest that class counsel has been laboring under an impermissible conflict of interest and that it may have preferred the interests of current clients to those of the future claimants in the settlement class" (quoting Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 Cornell L. Rev. 811, 832 (1995))).

The principles set forth in *Amchem* and *Ortiz* thus make plain that, just as in the litigation class context, the Rule 23 adequacy of representation inquiry in the settlement class context must focus on whether there is an impermissible conflict of interest or collusion between the representatives and defense counsel. *See also Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 397-98 (1996) (Ginsburg, J., joined by Stevens and Souter, JJ., concurring in relevant part) ("An adequate representative . . . vigorously prosecuting an action without conflict and bargaining at arms-length, may present different facts and a different settlement proposal to the court than would an inadequate representative."); 7A Charles Alan Wright et al., *Fed. Prac. & Proc.* § 1768, at 394 (3d ed. 2005) ("It therefore is obvious that a trial court must scrutinize carefully the party's claim to representative status as well as the party's relationship to other class members and to the opposing party to assure absent members that there is neither conflict nor collusion."). To be sure, the fact of the settlement – particularly the settlement negotiation process – makes concerns about conflict and collusion particularly acute. *See Ortiz*, 527 U.S. at 852. But that fact does not override the basic Rule 23 requirement that the court must find *actual conflict or collusion* before holding that class representatives are "disarmed" and thus inadequate.[2]

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[2] Moreover, this case differs dramatically from *Amchem* and other mass tort class actions that "provide enormous potential for collusive arrangements, particularly when future claimants are involved as they exacerbate conflict of interest problems between the attorneys and the plaintiff class and the class members themselves." 7B Wright, et al.,

Indeed, the decision below violates *Amchem*'s core holding, *viz.*, that a court *cannot* base its class certification decision solely on the fact that the case has been settled. In this case, the district court specifically found all the requirements of Rule 23 satisfied. App. 9a. As Judge Cudahy summarized those findings:

> In the present case, there are no disparate personal injuries. Plaintiffs' and all class members' claims arise from defendant's installation and maintenance of fiber-optic cable on railroad rights of way. Any harm rising from that installation has occurred and is capable of being ascertained. All class members also raise the same legal claims. Therefore the class has sufficient unity for settlement class certification purposes.

Id. at 8a. The panel majority did not respond directly, or suggest in any way how or why any specific requirement of Rule 23 was not satisfied in this case. Instead, the majority concluded that, because the case cannot be certified for litigation purposes, certification of a settlement class was also inappropriate. In other words, the majority opinion effectively disavowed the need to decide whether the class in this case *actually* satisfied the specific requirements of Rule 23 principally *because* the case was certified for settlement alone.

But *Amchem* does not suggest that courts should hold the fact of settlement *against* the certification of a class. To the contrary, the Court expressly rejected such a rule, as dis-

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Fed. Prac. & Proc. § 1797.3, at 160 n.2; *see generally* Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 Harv. L. Rev. 747, 750-51 (2002) (discussing the differences between mass tort settlements and other class actions, and the controversies surrounding the former); John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1442 (1995) (noting that the "mass tort context exacerbates [conflicts of interest] to a unique degree").

cussed above, *supra* at 13. By holding that settling plaintiffs are conclusively inadequate class representatives when individual statewide classes have been or could be certified – thereby eschewing the need for rigorous scrutiny of Rule 23's actual requirements – the Seventh Circuit has run afoul of *Amchem*'s basic teaching that the existence of a settlement *vel non* should not solely determine the outcome of the Rule 23 analysis.

3. That ruling also conflicts with decisions of the Third and Tenth Circuits in cases involving settlement class certifications, including the *Rutter & Wilbanks* and *Warfarin* cases discussed above.

In *Rutter & Wilbanks*, the Tenth Circuit affirmed the district court's certification of a $70 million settlement class over the adequacy-based objections of representatives of a similar ongoing class action in Texas state court. 314 F.3d at 1189. The court expressly rejected the objectors' contention that the settling plaintiffs were inadequate representatives because of an inherent conflict of interest with the members of the already-certified Texas litigation class. *Id.* at 1188 (citing *Amchem*, 521 U.S. at 627). In particular, the court rejected a "reverse auction" argument – identical to the argument advanced by intervenors here – that the settlement agreement was "collusive" and "designed to undercut the competing Texas class actions." *Id.* at 1189. Absent concrete evidence of collusion, the Tenth Circuit held, accepting the objectors' reverse-auction claim "would lead to the conclusion that no settlement could ever occur in the circumstances of parallel or multiple class actions" because "none of the competing cases could settle without being accused by another of participating in a collusive reverse auction." *Id.* (internal quotation marks omitted).

Rutter & Wilbanks cannot be reconciled with the decision below. According to the Tenth Circuit, settling plaintiffs cannot be deemed inadequate representatives of class

members in competing class actions unless there is actual, concrete evidence of such conflicting interests as collusion between the settling plaintiffs and the defendants. The Seventh Circuit demands no such showing, but instead conclusively presumes the existence of a conflict from the mere fact that some class members are also members of competing statewide or multi-state litigation classes.

The Seventh Circuit's decision also conflicts with the Third Circuit's decision in *In re Diet Drugs Prods. Liab. Litig.*, 282 F.3d 220 (3d Cir. 2002). In *Diet Drugs*, the Third Circuit held that even though a settlement class might encompass various potential competing subclasses, that fact "does not by itself establish an actual conflict undermining adequacy of representation." *Id.* at 231. Class members who had obtained certification of their own class in a Texas court with state-law based claims (and the potential for treble damages), objected to their inclusion in a national settlement class certified in federal court and attempted to opt out on adequacy of representation and other grounds. The Third Circuit held that the objectors to the class representatives must offer some concrete basis in the evidence to establish a conflict and hence inadequate representation, such as the presence of "trade-offs between the classes," proof that "benefits had been bargained for separately," or the existence of a "conflict between those seeking future benefits and those seeking them immediately." *Id.* Because the district court had made no such findings, the Third Circuit held that "there is no basis on which to find actual conflicts sufficient to establish that [the Texas] plaintiffs were not adequately represented." *Id.*

Similarly, in *Warfarin*, the Third Circuit affirmed a $44.5 million settlement between a defendant pharmaceutical company and a nationwide class of plaintiffs alleging antitrust and consumer fraud claims. The proposed settlement would dismiss all pending "federal MDL proceedings and related

state actions" against the defendant. 391 F.3d at 525. Like intervenors here, the *Warfarin* objectors argued that certification of the settlement class was improper because of differences in the strength of the claims that class members might bring under various state laws; for example, "certain class members may be eligible for treble damages or punitive damages under their state antitrust laws, while other class members, such as those from Tennessee, may be eligible for 'full consideration' damages." *Id.* at 530. The Third Circuit rejected this contention, concluding that "any material variations" in state law rights and remedies "could be considered in the context of calculating damages as well as in assessing the fairness of the settlement." *Id.*

The decision below conflicts with *Diet Drugs* and *Warfarin*, both of which declined to reverse the certification of settlement classes on precisely the grounds cited by the Seventh Circuit, *viz.*, that class members with live litigation classes pose a comparatively stronger threat to defendants than do settling plaintiffs, as do class members in states with laws that create the prospect of comparatively high recovery. Unlike the Seventh Circuit, the Third Circuit clearly holds that such theoretical problems do not pose a categorical bar to settlement class certifications. Under the Third Circuit's view (like the Tenth Circuit's), the inadequacy of settling plaintiffs' representation of class members with competing litigation classes (and arguably stronger claims) is not presumed but must be proved through concrete evidence of an actual conflict of interest or collusion between the settling parties.

Other circuits have also rejected the presumption of inadequacy standard adopted by the Seventh Circuit here. The consensus view is that adequacy of representation is determined through a case-specific inquiry into whether there is evidence of collusion or some other concrete conflict between the interests of the named plaintiffs and those of absent class members. *See James v. City of Dallas*, 254 F.3d

551, 571 (5th Cir. 2001) ("Differences between named plaintiffs and class members render the named plaintiffs inadequate representatives only if those differences create conflicts between the named plaintiffs' interests and the class members' interests." (quoting *Mullen v. Treasure Chest Casino, L.L.C.*, 186 F.3d 620, 625 (5th Cir. 1999))); *Gunnels v. Healthplan Servs.*, 348 F.3d 417, 430 (4th Cir. 2003) ("To defeat the adequacy requirement of Rule 23, a conflict must be more than merely speculative or hypothetical.") (internal quotation marks omitted); *see also Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003); *Station v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003); *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000). The Seventh Circuit identified nothing of the kind here – indeed, it flatly ignored the district court's finding that there was "no evidence of collusive negotiations in this case." App. 10a (Cudahy, J., dissenting).

The Seventh Circuit also ignored other "important indicia" of the adequacy of this settlement: "the absence of any indication of collusion, the protracted settlement negotiations, the ability and experience of plaintiffs' counsel, the extensive discovery preceding settlement and the fact that counsel for all parties – including the objectors – had access to materials produced in discovery." *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982) (Friendly, J.). Here, before certifying any class, the district court undertook a careful analysis of Rule 23's requirements, actively involving itself, with the assistance of a Magistrate Judge and a Special Master, over a period of months in a review of all aspects of the settlement. Yet rather than undertaking the "undiluted, even heightened" inquiry into whether the requirements of Rule 23 were satisfied, *Amchem*, 521 U.S. at 620, the Seventh Circuit applied a conclusive presumption

rejecting the adequacy of the settling plaintiffs' representation of all class members.[3]

Certiorari should be granted to bring the Seventh Circuit's standard for determining the adequacy of a settlement class representative into line with the prevailing view among other circuits – and the view enunciated in *Amchem* and *Ortiz* – and to clarify for *all* courts the importance of inquiring into *actual* conflicts or collusion in determining whether plaintiffs seeking to settle complex, nationwide commercial litigation adequately represent the interests of the class members subject to the settlement.

II. THE DECISION BELOW IMPLICATES PROCEDURAL AND ECONOMIC ISSUES OF THE HIGHEST IMPORTANCE

This case is unusually important in two respects.

First, the decision below erects a virtually insuperable barrier to the comprehensive resolution of complex, multiparty litigation. This Court has recognized the strong public policies "favoring the settlement of protracted litigation." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 407 (1992); *see generally* 4 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 11:41, at 87 ("[T]he law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation."). The decision below, how-

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[3] The failure to review the district court's actual findings also runs afoul of this Court's instruction that deference is owed to the district court. "The certification of a nationwide class, like most issues arising under Rule 23, is committed in the first instance to the discretion of the district court." *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979). Because the district court will be intimately familiar with the facts and parties in certification matters, "their judgments are to be reviewed by the Court of Appeals only for abuse of discretion." *Amchem*, 521 U.S. at 630 (Breyer, J., joined by Stevens, J., concurring in part and dissenting in part).

ever, renders it all but impossible to settle the most complicated, protracted categories of litigation – the very context in which the policies favoring settlement should apply most forcefully.

The decision below undermines the settlement of such cases because they so often involve multiple and overlapping class actions, filed in both federal and state courts and in the courts of different states. Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. Rev. 461, 462 (2000) ("dueling class actions – two or more class actions commenced on behalf of the same class or overlapping classes, which present claims arising out of the same transaction or occurrence – are rampant"); 7B Wright et al., *Fed. Prac. & Proc.* § 1798.1, at 231 ("One of the most troubling problems in the modern class-action arena is the filing of multiple, competing class actions in state and federal courts all directed toward the same conduct or activities, which are alleged to have caused harm that is multistate, if not national, in scope.").[4] Because multiple class actions, and actions seeking differing state-law remedies, are ever-present factors in complex, nationwide

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[4] The American Bar Association recently described the prevalence and harm of overlapping federal and state class actions:

> The Task Force early on identified the filing of multiple class actions on the same matters resulting in the pendency of overlapping or competing class actions in a number of courts as one of the most serious concerns with class action practice. Such overlapping class actions consume unnecessary litigation resources, encourage 'gaming' of court filings, and risk inconsistent treatment of like cases. The Judicial Panel Panel on Multi-District Litigation (MDL) permits consolidation of federal cases for pretrial proceedings, and, although a few states have similar devices for cases within their state, no such device exists for consolidating suits in different states.

American Bar Association, Report of the Task Force on Class Action Legislation to the House of Delegates (adopted Feb. 10, 2003) (internal citations omitted).

litigation, a rule holding that such factors necessarily preclude the certification of a nationwide settlement class is tantamount to a rule that such classes may *never* be certified. This in turn is tantamount to a rule that such cases may never be settled in any comprehensive, efficient manner. *See* Manual for Complex Litigation § 30.45 (3d ed. 2003) (stating that settlement classes "facilitate global settlement" and save litigation expenses). This case proves the point: as Judge Cudahy's dissent observes, the majority's rejection of the class certification will force all parties back into "state-by-state" litigation, which is of course "likely to produce a nightmare of complexity" and "inequitable treatment." App. 5a. An approach demanding such needless and costly inefficiencies in the resolution of complex commercial disputes should not be tolerated.

Second, as Judge Cudahy's dissent also explains, the Seventh Circuit adopted its anti-settlement-class approach in an especially inappropriate context: a conflict involving the arteries that give life to our "national communications infrastructure," which has "an important value for the national economy as well as for national security." *Id.* Some of the individual claims seek the physical removal of fiber-optic lines from that infrastructure, and yet the Seventh Circuit effectively forbids a conclusive, comprehensive, fair resolution of such claims. A festering conflict over the legal rights to and the physical status of the Nation's telecommunications arteries serves nobody's interests.

To be clear: petitioners do not contend that the public policy favoring the settlement of disputes should compel a court to ignore the requirements of Rule 23, whether in this crucially important context or in any other. To the contrary, our contention is that Rule 23's requirements *should be followed*, and a nationwide settlement class certified when and where appropriate under that Rule, as it is here. The strong policies favoring settlement, and the importance of conclu-

sively resolving the land-use rights underlying the Nation's telecommunications infrastructure, only further underscore the error in the Seventh Circuit's decision to erect an artificial barrier to the deployment of Rule 23 in the settlement context, as if the Rule were somehow uniquely ill-suited to that context. It is not: Rule 23 was written to promote class actions as a means of achieving "economies of time, effort, and expense, and promoting uniformity of decision as to persons similarly situated." Fed. R. Civ. P. 23, 1966 Adv. Comm. Note; *see Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 155 (1982) (purpose of class action is to conserve "the resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion" (quoting *Califano*, 442 U.S. at 701)). Those purposes plainly are served by the settlement class certification here.

The Seventh Circuit's rule disfavoring settlement class certifications is unsound as a matter of law and unwise as a matter of policy. It should not stand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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